

Case No 45571-4-II

(Kitsap County Superior Court No 13 2 00136 7)

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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MARCUS GERLACH and SUZANNE GERLACH, Appellants

v.

CITY OF BAINBRIDGE ISLAND, Respondent

KITSAP COUNTY SUPERIOR COURT CASE NO. 13-2-00136-7


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APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
THE HONORABLE JEANETTE DALTON

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APPELLANTS' REPLY BRIEF

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### **SUMMARY OF ISSUES IN THE CITY'S OPPOSITION**

The City's Opposition seeks to eviscerate the Appearance of Fairness Doctrine (AFD), via a decision by this Court. The City makes very little effort to defend the "troubling character" of the City's employees, agents and staff and continues to mislead the Court by arguing Land Use Petition Act (LUPA) claims. The City's arguments are without merit as this matter is not a LUPA case, but rather an Appearance of Fairness Doctrine (AFD) case. The City asks this Court to blatantly disregard all of the AFD violations in favor of the City's manufactured LUPA claim. The Gerlachs are entitled to a Decision in their favor regarding the multiple AFD violations and equitable relief, namely transfer of the application to a neutral and unbiased permit reviewer, for an impartial administrative Decision.

In their Reply, the Gerlachs ask this Court to: a) acknowledge the "troubling" AFD violations committed by the City's staff, agents and employees; b) vacate the City's defective and untimely Decision; and c) allow for the transfer of their application to a disinterested and neutral decision-maker. The Gerlachs do not ask for issuance of their permit, nor do the Gerlachs address the permit criteria used by the City in issuing an untimely and defective Decision. This is not a LUPA case and LUPA case law should not be applied.



The City's Director and Planning Commissioner are upset that they were caught red-handed when the Commissioner directed the Planner to deny only the Gerlachs' application. The Planner is frustrated that she was caught misleading the Court and the Gerlachs when she denied knowing the alleged trespasser, before she confessed to knowing the "anonymous" Bruce Woolever. It is understandable why the Planner concealed Bruce Woolever, as he later admitted to law enforcement that the City Planners are prejudiced against the Gerlachs, particularly regarding the Gerlachs' application.

The City simply asks this Court to ignore their multiple factual inconsistencies in the City's Opposition by stating, "the City vehemently disputes the Gerlachs' version of the facts." (Opposition pg 1). The inconvenient truth is that the City's actions were horrendous<sup>1</sup>. Facts cannot be disputed, only the interpretation of the "City's facts." The unadorned facts in this matter include: 1) The City's Current Planning Manager Machen previously used: a) non-existent permit criteria; b) altered permit criteria and a counterfeit US Army Corps map to deny the Gerlachs' previous mooring buoy permit- before the City was forced overrule Machen and grant the Gerlachs' mooring buoy permit. 2) The Gerlachs sued the City for the disparate and negligent actions of the City- which is presently still in

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<sup>1</sup> Verbatim Report of Proceedings of June 14, 2013, at pg 55, ln 21.

litigation in Kitsap County Superior Court. The issue with the City's employee is a legal issue only, not a personality issue. It is the City, and only the City, that has made this a personal matter regarding the Gerlachs.

3) As part of resolution with the previous mooring buoy permit, the City's Attorney stated in writing that the City would not retaliate against the Gerlachs' future applications (but the City refused to include the covenant of good faith and fair dealings in writing because the City *never intended to abide by the covenant*). 4) The City's Planning Commissioner, Maradel Gale (Gale), told the City's Planner to deny only the Gerlachs' application.<sup>2</sup> 5) Gale was silent on the City's own bulkhead application (CP 409-411), her own bulkhead (CP 93-95), and the bulkhead that the City/Machen permitted three parcels from the Gerlachs (CP 74-78). 6) The City's untimely and defective Decision mirrored the directive of Gale to deny only the Gerlachs' bulkhead. 7) The City's Answer (§ 3.8)-filed with the Court denied the knowledge of the alleged trespasser-before later revealing the identity.<sup>3</sup>

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<sup>2</sup> Commissioner Gale's cover letter to the City's Planner stated, "Please let me know when you have received this and **entered it** [letter directing denial of Gerlachs' application] **into the record for this decision.**"

<sup>3</sup> The City's Opposition never explained or even mentioned their Answer, which denied knowledge of the "anonymous parties". The City's Answer stated, "Defendants are without sufficient knowledge to form a belief as to whether the anonymous parties (whomever they may be) commented on other applications." "Defendants deny each and every other allegation contained in said Paragraph 3.8 in its entirety." The City knew the identity of the "anonymous parties" and concealed it from the Court and the Plaintiffs.

8) The alleged trespasser, Bruce Woolever, admitted to the City's police detective that the City's planners do not like the Gerlachs.<sup>4</sup> 9) The City attorney told the City's Hearing Examiner (HEX) that the HEX **did not** have the authority to adjudicate the AFD violations. Later, the City's attorney told Judge Dalton during oral argument that the HEX **did** have the authority to hear the AFD violations. The only "factual quagmire" (Opposition Pg 1) is between the "version of the facts" the City told the Gerlachs and the "version of the facts" that the City told the Trial Court. This "factual quagmire" is a sticky situation - of the City's own making - and is more properly described as the City's version of their manufactured facts, or the "facts" they wish they could ignore.

## **THE ONLY ISSUE IS IF THE COURT'S ORDER WAS IMPROPER**

### **1) "Troubling Character" Bears the Court Pause (Appendix B)**

Not surprising to the Gerlachs, the City's Opposition failed to mention that the Trial Court's Order recognized the "troubling character" (CP 357) of the City's agent, which caused the Trial Court "pause" before sending the matter to the HEX. The complete absence of any reference to the "troubling

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<sup>4</sup> The May 28, 2013 police report confirmed what the Gerlachs suspected and what the City already knew. The City's concealment of Bruce Woolever, was an attempt to conceal the prejudice and bias nature of the City's planners against the Gerlachs. The police report stated, "[H]e [Bruce Woolever] **knows** that Mr. Gerlach is suing the City and that the 'planners' don't like him." (CP 389-390)

character” belies the City’s hope that by ignoring their misdeeds, this Court may also ignore their “troubling character.” In determining if the Trial Court’s Order was in error, the Court must review the “troubling character.” This Appeal Court must reconcile why Commissioner Gale directed the Planner to enter her directive (to deny the application) into the record. The Court must reconcile why the Answer cloaked the identity of Bruce Woolever and denied knowledge of the alleged trespasser, before confessing to police about the identity. The Court must reconcile the admission that the Planners are prejudiced against the Gerlachs. The Court must reconcile why the City attorney instructed the HEX that the AFD violations **could not be decided by the HEX.** <sup>5</sup>(CP 434, Appendix C) before telling the Trial Court that the<sup>6</sup> only available remedy for the AFD violation, committed by the City’s staff, agents and employees was to send the case to the HEX because the HEX **could decide** the AFD violations. When the City Attorney contradicted himself, it became impossible for the Gerlachs to know what to believe and it was even more confusing when the Trial Court’s Order ignored this contradiction. When the Trial Court ignored this contradiction and referred the matter to the HEX, the Trial Court abused its authority.

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<sup>5</sup> “[T]he Hearing Examiner does not have the authority to determine whether the staff... violated the AFD.

<sup>6</sup> The City’s attorney told the Trial Court that the Gerlachs could raise the AFD violations before the HEX (Verbatim Proceedings June 4, 2013 at pg 40, ln 24-25 and Pg 41, ln 1-6, as well as pg 43, ln 8-15 (City’s Opposition pg 24)

## **2) AFD Violations Identified Before Defective/ Untimely Decision**

As indicated in the Opening Brief and the Opposition (Pg 12-13), the Gerlachs noted the City's AFD violations before the City ever issued any Decision on the Gerlachs' application. The Gerlachs merely requested the City transfer the application to the County (acting as a neutral and unbiased permit reviewer) to remedy the AFD violations. Rather than admit that the City's employees, agents and staff committed AFD violations, the City issued an untimely and defective Decision. The City simply rebuffed the Gerlachs' proposed remedy to transfer the application to the County and issued a Decision that mirrored the directive and AFD violation by Planning Commissioner Gale. When the City issued the Decision, they violated their own Municipal Code (CP 158- Appendix D). The City Planning Director, Kathy Cook (Cook) broke the City's own rules in order to deny the Gerlachs a fair and unbiased permit review. Cook is the same individual who denied that the City ever did anything wrong regarding the previous mooring buoy permit and was the same defender of Machen in that case. Cook was also the supervisor of City Planner Heather Beckmann (Beckmann), during the concealment of the alleged trespasser. The City staff all worked in concert to issue a defective Decision regarding the Gerlachs' current application.

The City's Opposition now suggests that a public hearing is required before an AFD violation can occur. The City's Opposition (Pg 21 fn 3) stated that the AFD violations can only occur during, or after, the public hearing. The City's logic would in effect allow any and all violations to the AFD, so as long as the violations took place before a public hearing. This argument would suggest that the City should get a free pass, so long as the acts of troubling character occur in secret and out of the public's eye. If the Court allows the free-pass argument, then it eliminates the AFD and provides all municipalities with the ability to engage in troubling character, so long as they don't get caught during a public hearing. The authorizing of AFD violations by a government entity, so long as they occur before any hearing, does not make sense. The City's staff, agents and employees should never be allowed to subvert fairness at any time.

### **3) City Ignored Plea For Fairness While Permitting Their Own Projects**

The Gerlachs have only sought a fair and impartial permit review process, not approval of their permit (Verbatim Transcripts (VT), June 14, 2013, pg 15 ln 16-25). The Trial Court agreed that, "the fairness doctrine indicates that a person should have a fair hearing." (VT pg 25, ln 3-4) but then ignored the Gerlachs' plea for fairness and impartiality and allowed the City

to treat the Gerlachs with contempt and inequality. Despite the obvious “troubling character” of the Defendant’s conduct, the Trial Court abused its authority by referring the matter to the City’s Hearing Examiner, thereby ignoring the defects in the City’s Decision. The Gerlachs therefore petition this Court to find the Trial Court’s Order in error, vacate the City’s defective Decision and transfer the Gerlachs’ application to the Kitsap County Planning Department (KCPD), as KCPD is “ready willing and able to process the application” fairly and with impartiality.

The City’s Opposition questions the need for fairness and impartiality in the permit review process, particularly when the City is the reviewing agency. According to the City’s Opposition, the applicant must be fair with the City, but the City need not be fair with the applicant. The City’s Opposition seeks confirmation from this Court to validate their double standard. Based upon the evidence submitted in this case, the City can permit other bulkheads in Eagle Harbor, including Commissioner Gale’s bulkhead (CP 93-95), the City’s own 340 foot long bulkhead (CP 409-411), or a neighbor bulkhead where a Planner washed windows (CP 74-78), but refuse to apply the same standards in reviewing the Gerlachs’ application. The Opposition suggests that the City staff can be prejudiced against the Gerlachs, (as admitted by alleged trespassers), and the Gerlachs should not insist on impartiality.



Without fair and equitable treatment from the City's employees, agents and staff, the City's violations of the Gerlachs private property rights will be irreparably harmed. This Court must intervene by declaring AFD violations and provide an adequate and equitable remedy to the Gerlachs, which allows for the impartial and unbiased review of their application.

#### **4) Commissioner Gale Directed Denial Of The Gerlachs' Application**

The Gerlachs were indeed surprised to find a cover page and letter in their file from Bainbridge Island Planning Commissioner Gale. The letter from the Commissioner simply directed the Planner to deny the application and let the Commissioner know when the directive was entered into the record for the application. The Trial Court correctly noted that the City's Planning Director did not ask the Commissioner to get involved, and asked the City why the Commissioner directed the planner to deny the application. (VT pg 35 ln 25 and pg 36 ln 1-2). The City's response was not convincing.

The City's retort was to deny the content of the letter, as they indicated in their Opposition. The City's Opposition further claimed a right to comment as a "private citizen." (Opposition pgs 12 & 33) Another Appeal Court already conclusively resolved this issue in *Hayden v City of Port Townsend* 28 Wn.App. 192, 197; 622 P.2d 1291 (1981). The Court in *Hayden* knew



that their decision would limit the freedom of speech and actions by persons who serve on commissions. The Court cited *Save a Valuable Environment v Bothell* 89 Wn.2d 862, 576 P.2d 401 (1978) when it held, “the doctrine prevents the presentation of views by public officials acting *even in their private* capacity in order to advance the goal of assuring public confidence in the fairness of the quasi-judicial decision-making process.” *Id* at 198. The *Hayden* court further stated, “As it has developed, the appearance of fairness doctrine has been applied not only to cases where actual conflict of interest is demonstrated, but also to situations where a conflict of interest **may have affected an administrative decision.**” *Id* at 195. This preservation of public confidence in the fairness of governmental actions was discussed in detail in the Declarations of Brian Sonntag and Lafe Myers (Opening Brief, Appendixes F and E)

The Trial Court erred when it allowed the City’s Director/Planner to issue an untimely and defective Decision, which mirrored the directive of Gale. The Trial Court committed reversible error when it failed to vacate the Decision and sent the matter to the HEX. The Trial Court erred when it ignored the City’s admission - that the HEX could not decide any AFD violations as it was beyond the HEX’s authority. (CP 351, 433-435 )

## **REBUTTAL ARGUMENT**

### **The City's Reliance Upon LUPA Cases Was Artificially Manufactured**

The City's Opposition cites numerous cases that address LUPA claims. This is not a LUPA case. The Gerlachs never filed a LUPA claim in this matter. The Gerlachs are not contesting the contents of the Decision, but rather the manner in which the City violated the AFD, **before** the City ever manufactured a defective and untimely Decision.

Soon after Commissioner Gale violated the AFD, the City devised a strategy to change the topic from the AFD to LUPA. The Gerlachs' Complaint alleged AFD violations **before** the City manufactured a Decision. The City's Answer, which was filed the day after the Decision was manufactured, only compounded the AFD violations (§3.8 denial of the alleged trespasser). The Decision also violated the Bainbridge Island Municipal Code (BIMC) 2.16.020 (J)(1), (see also Appendix D). By manufacturing a defective and untimely Decision, only to create a LUPA argument, the City committed more violations of the AFD and corroborated the claim of bias, partiality and discrimination. The application of LUPA cases is misplaced and wholly inapplicable to the alleged AFD violations, which occurred **before** any Decision was manufactured by the City.

In an abundance of caution, however, the Gerlachs distinguish the following cases:

**1) *Grandmaster Sheng Yen Lu v King County***

The Court in *Grandmaster v King County* 110 Wn.App 92, 38 P2d 1040 (2002) was a LUPA case that generally held LUPA was the exclusive means of judicial review of land use decisions. The *Grandmaster* Court sought to determine a boundary line adjustment under LUPA, rather than a Court Order. The Court noted that the *contents* of Decisions should be review under LUPA, not AFD violations, which occurred before the Decision.

The Gerlachs did not challenge the contents of the Decision, but rather challenge the unfair way the City (a governmental entity), is unwilling to provide fairness before a defective and untimely Decision is rendered. It is only because the City realized that they would need to later argue LUPA that they manufactured their defective and untimely Decision.

Contrary to the City's Opposition, permit **applications** for shoreline development are subject to the AFD. "Circumstances or occurrences arising within such processes [permit application process] that, by their appearance, undermine and dissipate confidence in the exercise of zoning power, however innocent they might otherwise be, must be scrutinized

with care and with the view that the evils sought to be remedied lie not only in the elimination of actual bias, prejudice, improper influence or favoritism, but **also in the curbing of conditions that, by their very existence, create suspicion, generate misinterpretation and cast a pall of partiality, impropriety, conflict of interest or prejudgment over proceedings to which they relate.** *Chrobuck v Snohomish County* 78 Wn.2d 858, 868; 480 P.2d 489 (1971) (**emphasis added**)

2) ***Reeder v King County/ Richards v Pulman/ Stafne v Snohomish***

The City's citation to *Reeder v King County* 57 Wn2d 563, 358 P2d 810 (1961) and *Richards v City of Pulman* 134 Wn App 876, 142 P3d 1121 (2006) and *Stafne v Snohomish County* 174 Wn2d 24, 271 P3d 868 (2012) are all inapplicable as they are LUPA cases and the Gerlachs' case is *not* a LUPA case. The City tried to create a LUPA case, when it manufactured a defective and untimely Decision. The Decision was drafted and served one day before the City drafted and served their Answer. The City violated their own Municipal Code in manufacturing a LUPA claim in an effort to confuse the Court and thwart its own BIMC rules. (CP 158, Appendix D).

3) ***Polygon Corp v City of Seattle***

The application of a building permit, does not require publication in a

newspaper, legal posting on the property, and publication of notice to all surrounding neighbors. A building permit is not the same as the Gerlachs' shoreline substantial development application (SSDP). The public hearing process for a SSDP begins with informal meetings with the planning department, similar to a building permit, but then encompasses additional meeting elements. Where the normal building permits ends, the SSDP requires publication of a legal notice in a newspaper of general circulation, legal posting of the application on the property, mailed notice to all neighboring properties and review of multiple comments, concerns and suggestions by the public. The process does not require a single meeting of all parties in one room at one time, but rather the City allows the public hearing to occur over several weeks and in some cases months. During this entire process for a public hearing on a SSDP, interested parties submit comment, questions and engage the planning department in dialogue similar to any other public hearing. The *Polygon* case did not deal with a SSDP or a public hearing, but rather only with a building permit that involved a specific construction project. Even without the public hearing process, the Court in *Polygon Corp v City of Seattle* 90 Wn.2d 59; 578 P.2d.1309 (1978) stated, "[A]llegations of partiality will [not] go untested by the Court." "The standards against which we test such allegations [of partiality] must be whether the allegations, if found to be

true, demonstrate actual partiality precluding a fair consideration of an application.” The *Polygon* Court agreed that alleged AFD violations should be tested by the Court. It is clear that the Gerlachs application involved significant public dialogue or public hearings and discussion, even including a directive from the City’s Planning Commissioner.

#### **4) *Families of Manito v City of Spokane***

The defendant’s citation to *Families of Manito v City of Spokane* 172 Wn.App. 727; 291 P3d 930 (2013) reiterated the holding in *Polygon Corp.* The Court of Appeals in *Families* stated, “While the appearance of fairness was not applicable to the city’s decision-making process, **judicial-like qualities were still needed in the process.**” **The Court implied that the appearance of fairness applies before a decision is made.** “The standard with which we test such allegations of partiality must be ‘whether these allegations, if found to be true, demonstrate actual partiality precluding fair consideration of an application.’ ”

The Gerlachs conclusively established that the City’s actions precluded a fair consideration of their application. The AFD violations included: 1) The City’s Planners discriminate against the Gerlachs because the Gerlachs are presently suing the City in another action (admitted by

alleged trespasser and concealed by the City's Planner); 2) The City's Planning Commissioner directed the denial of their application to the City's Planner; 3) The City's Answer tried to mislead the Court, as well as the Gerlachs (§3.8); 4) the City's Planning Director violated the BIMC by manufacturing a defective and untimely Decision; and 5) The City never intended to treat the Gerlachs' application in good faith or fair dealings.

### **The City Cannot Admit To Its Duty Of Good Faith**

Even when the City conceded that there is a common law duty of good faith and fair dealings in every contractual obligation, the City tried to excuse its duty of good faith and fair dealings in its written assurance to the Gerlachs. (Opposition 38-39) It is impossible to enter into any agreement with the City, when the City holds mental reservations about which applications of the contract the City intends to treat in good faith. The City simply believes that the City does not need to treat its citizens with an over-all duty of good faith. The Court cannot involve the HEX, without first requiring good faith.

The City cannot be trusted to act in good faith on any agreement (written or verbal) as evidence by the "troubling character" of the City's employees, agents and staff. For the City to now profess that it intends to act in good faith with the HEX, is to place blind trust in a known deceiver. If this Court

now forces the City's HEX to decide a matter (LUPA) that was not even plead by the Gerlachs in their litigation, then the City will never treat applicants in good faith, nor will the City ever abide by its own BIMC, particularly when manufacturing defective and untimely Decisions.

The Gerlachs ask this Court to find that the Trial Court erred when it concluded the City does not have a duty of good faith and fair dealings.

### **FAIRNESS REGARDING PROPERTY IS NOT A GAME**

When the City staff muse that the Gerlachs are not "playing the game" by having the audacity to: a) demand good faith and fair dealings, b) expect to be treated in an unbiased manner, or c) refuse to hire a planner/window washer to help with the permit, they fail to recognize that the Gerlachs do not see fairness as a "game." The AFD is not a "game" to the Gerlachs. Fairness regarding property ownership should not be a "game" to the City.

#### **1) The Gerlachs Have A Property Right That Demands Fairness**

The City's Opposition denies the Gerlachs of their fundamental rights of property ownership (Opposition Pg 3). One of the defining characteristics of property ownership is the right to make reasonable use of one's land *Washington ex rel. Seattle Title Trust Co. v Roberge* 278 U.S. 116, 121



(1928). The procedures for obtaining permits affecting property rights must comply with constitutional due process requirements, or fairness. *Mission Springs v City of Spokane* 134 Wn. 2d 947, 962-963, 954 P.2d 250 (1998).

The Gerlachs' request for fairness regarding their application unquestionably involves the exercise of a protected property right. The Gerlachs' application was to protect their property, recognizing that shoreline property has an inherent right to protection (from wave erosion). *Stop the Beach Renourishment Inc. v Florida Dept of Env'tl. Prot.* 130 S. Ct 2598 (2010); *Alexander Hamilton Life Ins Co. v Gov't of Virgin Islands* 757 F2d 534, 538 (3<sup>rd</sup> Cir 1985). Washington Courts specifically recognize that owners of second-class tidelands, such as the Gerlachs (CP 51) hold a protected right to using the shoreline. *In re Clinton Water Dist.* 36 Wn 2d 284, 287-288, 218 P2d 309 (1950); *Hughes v Washington* 389 U.S. 290, 293-294 (1967) (explaining access to the water is protected because it is often the most valuable feature of shoreline property); *Hudson House v Rozman* 82 Wn 2d 178, 183-184, 509 P.2d 992 (1973). It is undeniable that the Gerlachs have a vested property right, which requires fairness.

## **2) The City Is Required To Act Fairly In Permit Applications**

The City's Opposition disputes any mandate for fairness in permit applications. (Opposition Pgs 26-30) Due Process requires equal and fair treatment. The Equal Protection Clause of the United States Constitution and the Washington State Constitution require equal treatment, particularly when one of the parties is a municipality or government. Equal treatment by government agents is the foundation of fairness. The specific language of the Fourteenth Amendment states in relevant part:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws...*”

The Washington State Constitution interprets the term Privileges and Immunities the same as the United States Supreme Court interprets Article IV of the United States Constitution. The Washington State Supreme Court defines the term privileges and immunities as pertain[ing] alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. *State v Vance* 29 Wn 435, 458; 70 P. 34 (1902). Case law suggests that the Washington State Supreme Court interprets the privileges and immunities of Article I Section 12 [of the Washington State Constitution] consistently with the United States

Supreme Court's interpretation of privileges and immunities under the federal constitution.(See *Nw Nat'l Ins Co v Fishback* 130 Wn. 490, 494; 228 P. 516 (1924). The Washington Courts therefore, "find guaranty in substance" between the Equal Protection Clause and the Washington State Constitution. *State ex rel Makris v Superior Court for Pierce County* 113 Wn. 296; 193 P. 845 (1920).

Because of past legal disputes, ongoing unprofessional conduct, or personal prejudices (the Trial Court noted these as the "troubling character" of actions by the City's staff), the City is incapable of treating the Gerlachs with fairness. The City cannot even be candid with the Court about the authority of the HEX in resolving AFD violations. Accordingly, the City cannot, or will not review the Gerlachs' application in an unbiased and neutral manner. The facts clearly demonstrate that the City's employees, agents and staff are predisposed to treat the Gerlachs in a disparate fashion. Municipalities are not allowed to single-out a permit applicant and treat them in a dissimilar fashion. *Westbrook v Burien* 140 Wn.App 540, 588; 166 P.3d 813 (2007).

### **3) The City Should Treat The Gerlachs Fairly And Equally**

The Gerlachs only sought to be treated in a similar, or equal, position as

other applicants, including Maradel Gale who owns property in Eagle Harbor, which has a hard armor bulkhead (CP 93-95 ), property at 427 Lovell Avenue (CP 74-78), or even the City's own 340 foot long, cement bulkhead at the entrance to Eagle Harbor (CP 409-411) (Opposition pg 15, only mentioned one of the disparate cases and provided a weak explanation for the dissimilar treatment). The Gerlachs should not be treated differently simply because they had the audacity to insist upon fairness and equal protection under the law, which is afforded under both the United States Constitution and the Washington State Constitution.

The Courts have held, that the "aim and purpose of [Article I Section 12] and the [Equal Protection Clause] is to secure equality of treatment of all persons, *without undue favor on the one hand or hostile discrimination on the other.*" *Grant County Fire v City of Moses Lake* 150 Wn. 2d 791, 810; 83 P.3d. 419 (2004). To afford special rules and protections to other applicants, including Commissioner Gale's bulkhead, neighboring bulkheads, or the City's own bulkhead smacks in the face of justice and unfairly discriminates against only the Gerlachs. This is particularly true regarding the City's own bulkhead permit, which was recently acquired via the City's Planning Department, and is located at the entrance to Eagle Harbor (near where the Gerlachs reside).

#### **4) The AFD Requires Only One Violation To Reverse The Trial Court**

Only one violation is necessary to establish breach of the AFD. *Buell v Bremerton* 80 Wn.2d 518, 524; 495 P.2d. 1358 (1972) The *Buell* court held a violation of: a) personal interest; b) prejudgment of issues; **or** c) partiality could establish a breach of the AFD. Any **one** breach vacates a defective Decision. Strict fairness requirements of impartiality are mandated in property matters. The AFD was designed to ensure the permit process is procedurally fair. *Smith v Skagit* 75 Wn.2d 715, 740; 453 P.2d 832 (1969). The AFD, a tenant in law based in equity, was codified under RCW 42.36.

The AFD is predicated upon equity. The goal of equity is to do substantial justice. Washington Courts embrace a long and robust tradition of applying the doctrine of equity. The doctrine of equity was very recently upheld in *Columbia Community Bank v Newman Park LLC* 177 Wn.2d 566; 304 P.3d. 472 (2013). The establishment of the AFD was an attempt to bolster public confidence in fair and unbiased decision-making by making certain, in both ***appearance*** and in fact, in order to assure that parties receive equal treatment. The AFD does not require actual violations of unfairness, but merely the *appearance of unfairness*.

### **5) The City's AFD Violations Disqualify It From Being Fair**

If the City's past conduct and improper actions disqualify the City from being the reviewing agency, then where can the Gerlachs go for permit review? The Kitsap County Planning Department is the only agency willing to be unbiased and impartial regarding the Gerlachs' application. KCPD [indicated it was] ready, willing and able to assist the City and review the Gerlachs' application. (CP 110). The City would not stipulate to a transfer to a fair and impartial agency despite the obvious need for a neutral and unbiased permit review. (CP 154-159 - Appendix D, 160-163, Appendix F). The Gerlachs are entitled to fairness and were unfairly discriminated against by City employees, agents and staff, regarding their application. (Opposition pg 12)

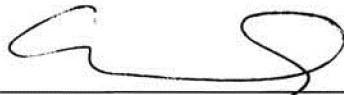
### **CONCLUSION**

Despite the position taken in the City's Opposition, all permit decisions must be **free** from any AFD violations **before** being brought to the HEX. The Trial Court erred when it denied the Motion for Summary Judgment and Ordered the Gerlachs exhaust their administrative remedies with the HEX. The City attorney confirmed that the **HEX cannot decide AFD violations**. Accordingly, the Court of Appeal should reverse the Trial Court's Decision. To uphold the Trial Court's decision would be to endorse

the City's double standard of discriminating against only those applicants that it wishes to single out and treat in a disparate manner. The Gerlachs asked for justice from the Trial Court, but it is difficult to obtain justice, if the Court is unwilling to provide justice. The Gerlachs now seek justice from the Court of Appeals.

The Court has an obligation to mandate fair and impartial proceedings, leading up to and including the processing of a permit. Governments should not be allowed to use administrative decisions as weapons to defeat fairness and equality. As Justice Brandeis noted in his dissenting opinion in *Olmstead v U.S.* 277 US 438 (1928), which was later overruled by the Court, **"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law... it invites anarchy."** The Gerlachs seek the imposition of fairness and the law against the City [Government] regarding the multiple AFD violations.

DATED this 18 day of April, 2014



Marcus Gerlach SBN 33963  
Attorney for Marcus Gerlach  
and Suzanne Gerlach

### CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing (Petitioner's Reply Brief) on the party mentioned below:

James Haney, Esquire Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	<input type="checkbox"/> Email <input type="checkbox"/> Fax <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Process Service
Julie Cederberg, <i>MARTHA TANNER</i> Receptionist for James Haney, Esq. Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	<input type="checkbox"/> Email <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Process Service

DATED at Seattle, Washington, this 18th day of April, 2014.

  
David Dean